

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	NO. 05-357
	:	
DENROY GAYLE	:	

MEMORANDUM AND ORDER

Stengel, J.

March 12, 2007

Denroy Gayle was convicted of being a felon in possession of a firearm, possessing a firearm in furtherance of a drug trafficking crime, and possessing crack cocaine with intent to distribute. His conviction followed a five-day jury trial. Mr. Gayle has filed a post-trial motion for judgment of acquittal and for a new trial. For the reasons that follow, I will deny Denroy Gayle's post-trial motions.

I. Motion for Judgment of Acquittal

This Rule 29 motion seeks a judgment of acquittal on the basis of the defendant's claim that the evidence was insufficient to support the verdict. The court is required to review the record in the light most favorable to the government to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence. See United States v. Wolfe, 245 F.3rd 257 (3d Cir. 2001). The court is directed to "draw all reasonable inferences in favor of the jury's verdict." United States v. Anderskow, 88 F.3rd 245 (3d Cir. 1996).

The evidence in this case against the defendant was very strong. The police observed Denroy Gayle sell crack cocaine to a confidential informant from the front door

of Gayle's home. The police observed these sales on the two days prior to the defendant's September 10, 2004 arrest. On September 10, 2004, the police executed a search warrant at the defendant's home and found him to be in possession of pre-recorded "buy money" that had been used by the informant to buy crack cocaine from the defendant on September 9, 2004. Gayle also had \$670.00 in cash in small bills, and was the only occupant of the house in possession of a significant amount of cash. The police found a digital scale, commonly used by drug dealers to measure quantities for sale, in the kitchen of the home. Denroy Gayle's fingerprints were on the digital scale and the jury heard this evidence. The police found the crack cocaine in a locked safe just inside the front door. The packaging of the crack cocaine, the type of crack cocaine, and the appearance of the crack cocaine all matched the crack cocaine that the defendant had sold to the confidential informant on the two days prior to September 10. There was also a gun in the safe, and there was another, loaded gun in plain view between the front door and the safe.

The government presented an expert witness who testified that the packing and quantity of the crack cocaine, the presence of the gun and the scale, and the defendant's possession of a significant amount of cash in small denominations were all consistent with possession of the drugs with intent to distribute.

Sergeant Lohenitz of the Easton Police Department observed two sales of crack cocaine by Denroy Gayle to Sergeant Lohenitz's confidential informant. These sales

were made at the door of Gayle's home and on his front porch. Lohenitz was observing the sales from a vantage point in a parking lot across the street. Lohenitz provided the confidential informant with marked buy money, observed the confidential informant make the purchase, and obtained the crack cocaine from the confidential informant immediately after the purchase.

Gayle did not admit possession of the drugs nor possession of the guns to the police. The facts established at trial, by direct and circumstantial evidence, were more than sufficient for a reasonable jury to find that the defendant knowingly possessed the drugs and the guns inside the home on September 10, 2004. The quantity of the drugs found in the home was undisputed and was clearly more than 5 grams. At the second phase of the trial, the government proved that the defendant was a convicted felon and that the guns were manufactured outside of Pennsylvania.

In his motion for judgment of acquittal, the defendant has a very heavy burden to establish that the evidence was insufficient. He has failed to meet this burden. Based upon a review of all the evidence, direct and circumstantial, admitted at trial, I find there to be no question whether a rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence. The evidence was strong and it clearly pointed to Denroy Gayle's guilt on all the charges.

II. Motion for a New Trial

A. Evidence of Fingerprints

Denroy Gayle filed a pretrial motion to exclude the testimony of the government's fingerprint expert. On May 31, 2006, I held a hearing where I was advised by counsel for the defendant that he was withdrawing his Daubert motion to exclude the fingerprint expert's testimony. I directed the government to provide further discovery regarding its proposed fingerprint expert's testimony, and I declined to grant the defendant's request that I exclude the testimony at that time. The government provided the defense with a second report from its fingerprint examiner, and I granted the defense request for additional time to obtain a defense fingerprint expert. The trial was delayed for approximately two months for the defendant to retain his own expert to examine the fingerprint evidence. No fingerprint expert was called by the defendant at trial, nor was any report disclosed to the government. The defendant did not raise any objection to the government's fingerprint expert, either pretrial or during the trial. The expert testified as to the identification of the defendant's fingerprints and it was clear from his testimony that Denroy Gayle's fingerprints were on the digital scale found in the kitchen of Gayle's home.

B. Disclosure of the Confidential Informant

Denroy Gayle filed a pretrial motion for disclosure of the identity of the confidential informant. I denied the defendant's request that the government provide the

identification of the confidential informant after reviewing briefs, holding a hearing, and giving these issues careful consideration. The defendant now contends that this was error and that he should receive a new trial.

The law recognizes a strong policy in favor of protecting confidential informants. See Roviaro v. United States, 353 U.S. 53 (1957).¹ “The identity of an informant can be disclosed where the defense makes an adequate showing that disclosure is ‘relevant and helpful to the defense’ or ‘essential to a fair determination of a cause.’” Id. at 60-61. The defendant bears the burden of establishing a need for disclosure of the confidential informant. United States v. Jiles, 658 F.2d 194 (3d Cir. 1981).

Denroy Gayle argues that the standard applied in United States v. Harrison, No. 04-768, 2005 U.S. Dist. LEXIS 6195 (E.D. Pa. 2005) is instructive and should be utilized here. This opinion is not binding on this court and in fact, has not been reviewed on appeal or cited by any other court. Harrison alters the standard established by the Supreme Court in Roviaro and affirmed by the Third Circuit in subsequent decisions. The Harrison court determined that “where, as here, the confidential informant is the sole participant, other than the accused, in the transaction charged² and is the only witness in a

¹ In Roviaro, the Court required disclosure of the informant’s identity because the informant had been the sole participant in the charged transaction; was the only witness in a position to contradict the testimony of the government witness; and denied having seen the defendant before. 353 U.S. 64-65. While Denroy Gayle argues that Roviaro is not distinguishable, I find that it is because the confidential informant in this case did not participate in the charged conduct and told the police that defendant Gayle was the seller.

² As the Harrison rule also depends on the confidential informant’s participation in the charged conduct, it is distinguishable from this case. The court’s order highlights this distinction by requiring the government to disclose the informant’s identity or dismiss the count of the charge that the informant participated in.

position to amplify or contradict the testimony of government witnesses, his or her testimony is inherently material to a fair determination of guilt or innocence and highly relevant to the defense of the accused....[the] Defendant need not make an independent showing that the CI's testimony would be material to his defense in this case.” Id. at *13 (citations omitted). The Third Circuit has continued to affirm the Roviaro standard that a defendant must establish a specific need for disclosure. See e.g. United States v. Thomas, 58 Fed. Appx. 915, 919 (3d Cir. 2003); United States v. Brown, 3 F.3d 673, 679 (3d Cir. 1993) (affirming use of Roviaro and noting that this standard affords “substantial leeway to the trial courts to determine on a case-by-case basis whether disclosure is warranted, instructing the courts to weigh ‘the public interest in protecting the flow of information against the individual's right to prepare his defense.’”) Denroy Gayle is unable to meet the Rovario standard for compelling disclosure. The defendant contends that the confidential informant is the only witness who can truly link him to the drug sales. He argues that the “middle man” or an essential party to the drug transactions was missing at trial and that the government’s case is, therefore, somehow weakened because the confidential informant did not testify. Defense counsel argues after the verdict that he should have been allowed to cross-examine the confidential informant. The defendant has made no showing, before trial or after trial, that the testimony of the confidential informant or the opportunity to cross-examine the confidential informant would have been “relevant and helpful to the defense” or “essential to a fair determination of a

cause.”³

In truth, there was little question about the identity of the defendant at trial. Sergeant Lohenitz testified that he saw the defendant come to the door and speak to the confidential informant at each of the two sales. The second transaction between the defendant and the confidential informant was out in the public, i.e., on Denroy Gayle’s front porch. Sergeant Lohenitz testified that he saw the defendant and that he observed the transactions on the two days prior to the defendant’s arrest. Certainly, the jury was free to reject Sergeant Lohenitz’ testimony. In fact, his testimony about observing the defendant and his identification of the defendant was uncontroverted and was not impeached by either evidence or argument.⁴

Defense counsel seems to argue that the government should have put on a stronger case. Defense counsel suggests that a positive identification from the confidential informant was essential for a conviction in this case. It appears that the defendant wants to set up a “straw man,” i.e. that the confidential informant is essential to the

³ Speculation that evidence might be helpful does not meet the standard set by Roviaro and affirmed by the Third Circuit. United States v. Bazano, 712 F.2d 826, 839 (3d Cir. 1983) (en banc) (holding that defendant could not compel identification of a confidential informant by presenting only vague reasons for needing the informant’s identity); Jiles, 658 F.2d at 197 (“The mere speculation that an eyewitness may have some evidence helpful to defendant’s case is not sufficient to show the specific need required by Roviaro.”); United States v. Brenneman, 455 F.2d 809, 811 (3d Cir. 1972) (finding that defendant’s speculation that an informant’s testimony might be useful for impeachment purposes was insufficient to meet his burden of demonstrating a specific need for the informant’s identity).

⁴ This was not a case where the confidential informant went to a location out of sight of the officer and bought drugs. In that case, perhaps, the confidential informant would be a more material witness as to the identity of the drug dealer. Here, the meeting between the confidential informant and the defendant was observed by the police officer who testified at trial. Under these circumstances, the interest in protecting the identity of the informant far outweighs the “need” to have him testify and bolster the officer’s identification of the defendant.

government's case, and to then knock down that "straw man" by establishing that he is not worthy of belief. Presumably, this informant fits the profile of most informants, that is, a person immersed in the drug culture. The defendant's interest in holding up this "drug buyer" to the jury and arguing that the government's case should not be trusted for using witnesses of bad character is a reasonable defense strategy. But in no way does this address the standard for disclosure of a confidential witness. To say that the opportunity to cross examine a witness would have been important for the defense, as the defendant argues post-trial, is not the same as saying that disclosure of the confidential informant is essential to a fair determination of this case.

The government did not need the confidential informant to testify at trial. Sergeant Lohenitz watched the transaction and identified the defendant. The credibility of the confidential informant has nothing to do with this case and the defendant had no right to require the government to call an unnecessary witness so they could attempt to impeach this witness.

In this case, the evidence against Denroy Gayle was overwhelming. There was certainly probable cause to effect the search of Gayle's residence. The scale found in the kitchen contained Denroy Gayle's fingerprints.⁵ In addition, the drugs found in the house

⁵ In fact, I excluded evidence of a field test done for the presence of cocaine on the digital scale. This field test would have disclosed that there was a residue of cocaine on the scale. Because I did not think the field test met the standard for reliability, I granted the defendant's motion to keep this out. The jury was left with the opinion testimony of the government's expert that the presence of the scale indicated that the defendant was weighing quantities of cocaine for sale or distribution. The jury was free to accept or reject this theory about the presence of the scale.

were packaged exactly like the drugs sold to the confidential informant. Some of the currency found in Denroy Gayle's possession matched the serial numbers of the "buy money" given to the confidential informant by Sergeant Lohenitz and used in the purchase observed by Sergeant Lohenitz.⁶

III. Conclusion

For these reasons, I find that the defendant has fallen short of meeting his burden for a judgment of acquittal or for a new trial. The post trial motions are denied.

⁶ The defendant offered an explanation at trial for his possession of a large amount of cash. A witness called by the defendant testified that Denroy Gayle had been given this money by his father to pay the delinquent water bill on the house. The jury heard this explanation and was free to consider this explanation for the possession of a large amount of money. No explanation was given for the matching serial numbers between Denroy Gayle's money and the buy money beyond mere "coincidence."

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ORDER

AND NOW, this 12th day of March, 2007, upon consideration of Defendant's Post-Trial Motion for Judgment of Acquittal and/or New Trial (Doc. No. 102), the government's response, the parties' supplemental briefings, and after a hearing on the motion, it is hereby **ORDERED** that Defendant's Post-Trial Motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.